

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OREE RILEY,

Defendant-Appellant.

UNPUBLISHED

April 3, 2003

No. 238196

Wayne Circuit Court

LC No. 01-002303-01

Before: Kelly, P.J., and White and Hoekstra

HOEKSTRA, J., (*dissenting*).

I respectfully dissent.

The majority concludes that three of the four factors that the trial court articulated to be substantial and compelling reasons for an upward departure from the statutory sentencing guidelines adequately support the sentence in this case. Because I conclude that the trial court improperly considered three of the four articulated factors, I would vacate defendant's sentence and remand for resentencing.

In departing from the statutory guidelines, the trial court relied on defendant's juvenile criminal history for violent offenses. Defendant's convictions of unarmed robbery and receiving and concealing stolen property as a juvenile are objective and verifiable factors, but they are considered by prior record variable (PRV) 3, MCL 777.53, concerning prior high severity juvenile adjudications, and PRV 4, MCL 777.54, concerning prior low severity juvenile adjudications. Thus, neither of these factors can be used as a basis for departure unless the trial court finds that the guidelines do not give them adequate weight. MCL 769.34(3)(b). Because the trial court failed to address whether the scoring of defendant's prior juvenile record was inadequate, I conclude that the trial court improperly relied on defendant's prior convictions for the purpose of departing from the guidelines.

The majority also concludes that in departing from guidelines the trial court properly relied on the fact that the victim was an elderly widow, targeted for a broad daylight robbery. However, like defendant's prior record, this factor is objective and verifiable, but it is accounted for under offense variable (OV) 10, MCL 777.40, concerning exploitation of a vulnerable victim, and again, the trial court did not state that the scoring of this factor was inadequate. Thus, to the extent the trial court relied on this factor as grounds for a departure, it was improper. MCL 769.34(3)(b).

Next, I agree with the majority that the trial court improperly relied on quality of life considerations to justify a departure because that factor is not objective and verifiable.

The final factor for departure was the extent of the victim's injuries and the psychological effect the offense has had on the victim. This factor is addressed in the guidelines under OV 3, MCL 777.33, concerning physical injury to the victim, and OV 4, MCL 777.34, concerning psychological injury to the victim. Here, however, the trial court clearly indicated that the scoring failed to take into account the extent to which the victim's life has been impacted by defendant's crime and the record fully supports the trial court's finding that the circumstances of this case present substantial and compelling reasons for an upward departure. In particular, the victim's complete loss of her ability to move freely about her community due to the psychological impact of this crime is objective and verifiable and is not adequately reflected in the scoring of only 10 points for OV 4.

Consequently, I find that defendant's sentence of nine to fifteen years' imprisonment, which is an upward departure of nearly double the high end of the statutory guidelines range of 29 to 57 months, is supported by only one of the four factors on which the trial court relied. Given this circumstance, I conclude that defendant's sentence should be vacated and the case remanded to the trial court for resentencing. See *People v Hegwood*, 465 Mich 432, 437, n10; 636 NW2d 127 (2001).

/s/ Joel P. Hoekstra